

## Dutch Supreme Court backs damages for child for having been born

Tony Sheldon *Utrecht*

The Dutch Supreme Court has agreed to the award of damages to a severely disabled child for the fact that she was born—a so called wrongful life. This is the first such case in the Netherlands, and the decision sets it apart from international opinion.

Kelly Molenaar, now 11, was born with several mental and physical disabilities as a result of a chromosomal abnormality inherited through her father. Her mother had been aware of the genetic risks and had asked a midwife at the Leiden University Medical Centre whether

prenatal diagnostic tests were necessary. She was told they were not, and neither was the case referred to a clinical geneticist.

Courts had earlier accepted that further tests would have revealed the abnormality and that the parents would have chosen a termination. They also accepted that the midwife made a professional mistake and, together with the hospital, is liable and that damages should be awarded (*BMJ* 2003;326:784).

Now the Supreme Court has reinforced the previous judgment that the damage suffered by Kelly and her parents was caused by the midwife's mistake and that they are entitled to compensation for material and emotional damage.

But it also accepted the wrongful life argument—and, therefore, that Kelly was entitled to compensation for emotional damage because of the fact she was born. This was a predictable consequence of the midwife's

mistake by which Kelly's interests as an unborn child were contravened, it said.

The Supreme Court awarded all the costs of Kelly's upbringing and care, including those connected with her disabilities, and compensation for emotional damage suffered by Kelly and by both parents, as well as the cost of the mother's psychiatric treatment needed after the birth.

It stressed that in attributing emotional damage it did not imply that Kelly's existence was a source of suffering. Damages were based exclusively on the fact that the midwife made a serious mistake with regard to the fundamental rights of the parents and that this should receive recognition in compensation. Damages awarded against the hospital have not yet been set.

The Supreme Court denied that the judgment could lead to more defensive medical practice, arguing that the case is exceptional. The criterion for liability, it states, is whether the midwife

can have been expected to act with "reasonable competence." It said that both the hospital and midwife accepted that there were shortcomings in this respect.

But Joep Hubben, professor of health law at Groningen University, said that the judgment leaves the Netherlands as a "legal island."

"Almost nowhere in the world would this claim be allowed," he said.

Courts in the United Kingdom and in Germany have rejected claims for wrongful life. Professor Hubben said that in Germany the court argued that claiming damages for the fact of living was "contrary to human dignity."

Professor Hubben and others are now calling on the Dutch government to forbid such cases, as happened in France after the case of Nicolas Perruche in 2001, when the courts also upheld a damages claim for "being born" (*BMJ* 2001;323:1384). □

## Draft mental health bill needs major overhaul, says committee

Clare Dyer *legal correspondent, BMJ*

Government plans to reform mental health services will force too many people into compulsory treatment and erode their civil liberties, a committee of MPs and peers appointed to scrutinise the legislation has warned.

The draft mental health bill is "fundamentally flawed" and needs a major overhaul, concludes the joint parliamentary committee, which was appointed to scrutinise the bill and recommend improvements before a final version is put before parliament.

The committee says the bill places too much emphasis on protecting the public from a small minority of dangerous mentally ill people at the expense of the civil rights of the majority who pose no risk to others.

It warns that the powers granted by the bill could be used as the equivalent of a "mental health antisocial behaviour order," forcing treatment on people who might be a nuisance but who pose no major risk to the public.

The committee concludes that compulsory treatment is

warranted only if there is a significant risk of serious harm to others. Patients should never be treated under compulsion unless their decision making is impaired, it says, and any compulsory treatment must be of therapeutic benefit.

The wide definition of treatment in the bill means people with a diagnosis of a personality disorder or learning disability could be detained on the grounds of public safety rather than to benefit their health, say the MPs and peers.

People who cannot benefit from treatment, including those with dangerous and severe personality disorders, should be dealt with by separate legislation, the committee recommends.

It says the primary purpose of mental health legislation should be to improve services and safeguards for patients and to reduce the stigma of mental disorder. These fundamental principles must be set out clearly in the legislation, it says.

Although the committee supports compulsory treatment in

the community, it believes it should be more restricted than is currently proposed, with clear criteria setting out who can be treated at home and time limits on the length of treatment.

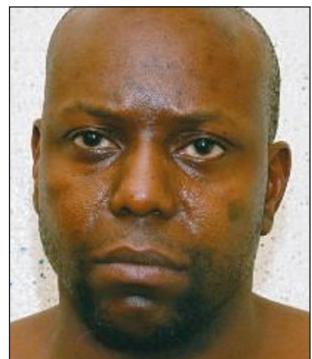
The committee has "major concerns" about the resources needed to implement the legislation. "We lack confidence in the government's models and underlying assumptions used to predict the funding and staff required to make the new provisions work," it says.

"The bill is fundamentally flawed. Far too many people could be forced into treatment unnecessarily," said the committee.

tee's chairman, Lord Carlile of Berriew. The bill "is too focused on addressing public misconception about violence and mental illness and does not do enough to protect patients' rights," he added.

Mental health charities and the Royal College of Psychiatrists have welcomed the report. The health minister Rosie Winterton said the government would look at the report in detail. □

The committee's report, *The Draft Mental Health Bill* (code HC 95-1), can be accessed at [www.parliament.the-stationery-office.co.uk](http://www.parliament.the-stationery-office.co.uk)



METROPOLITAN POLICE/PA/EMPICS

The draft mental health bill places too much emphasis on protecting the public, say MPs. Pictured are Lee Jarvis (left), who attacked a 79 year old man with a hammer in 2004 and was detained in hospital indefinitely, and Peter Bryan (right), who was given two life sentences in March for killing a man and eating his brain